

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

R. Martin PL 2

FILE:

B-192248

MATTER OF:

Ikard Manufacturing Company

DATE: September 22, 1978

DIGEST:

1. Where agency determines after bid opening that specifications overstate its minimum needs, cancellation or solicitation is required.
2. Contracting officer's written determination to cancel solicitation, which is undated and could have been prepared subsequent to protest, is deficiency of procedure and form, not of substance, and does not affect validity of cancellation.
3. Recovery of bid preparation costs is not permitted where action by procuring agency is not arbitrary or capricious.

Ikard Manufacturing Company (Ikard) protests the cancellation after bid opening of invitation for bids (IFB) DAAH01-78-B-0056 by the U.S. Army Missile Materiel Readiness Command (MIRCOM), Redstone Arsenal, Alabama. Ikard contends that the sole purpose of the cancellation was to avoid award to Ikard.

The solicitation called for bids to provide 59 hydraulic locks for a missile system. The Sonora Manufacturing Company (Sonora) which was the low bidder received a negative pre-award survey recommendation because, among other things, it planned to substitute steel bar stock for the castings required by the specifications. The firm was denied a certificate of competency (COC) by the Small Business Administration (SBA). As a result of a protest from Sonora, the contracting officer requested that the MIRCOM engineers review the specifications. They determined that use of steel bar stock instead of castings would result in an equal, if not superior, product. Based thereon, the contracting

officer determined that the original specifications requiring castings did not accurately reflect the actual needs of the agency and should be revised. Thereafter the solicitation was canceled and Ikard protested the cancellation to this Office.

During the review by the MIRCOM engineers, the contracting officer requested several of the other bidders, including Ikard which was the next low bidder, to extend the acceptance dates of their bids. Some of the bidders commented that they could have bid lower prices had the specifications permitted use of bar stock. Ikard was also contacted to establish a date for a pre-award survey but because at least six negative pre-award surveys were performed on Ikard within the previous 30 days, MIRCOM decided that another survey was unnecessary. On April 21, 1978, it determined that Ikard was nonresponsible because of its poor performance record which included twelve contracts terminated for default during the previous six months. MIRCOM then referred the matter to the SBA for possible issuance of a COC. Ikard was informed that the COC had been approved by the SBA but subsequently, it received the amendment canceling the solicitation.

Ikard contends that the six negative pre-award surveys were conducted during a period when MIRCOM was conducting a campaign to insure that Ikard received no awards and that in spite of such recommendations, the SBA approved COCs in four of the six cases and Ikard did not apply for COCs in the remaining two cases. Ikard doubts that the cancellation was due to a change in the agency's needs and submits that the real reason was to avoid awarding the contract to Ikard.

The Army denies any bad faith. It contends that after the use of bar stock was determined to be more cost effective than castings and equally satisfactory for production of small quantities, it was proper to cancel the solicitation and obtain competition on the basis of the relaxed specifications.

This Office has often stated that a solicitation may be canceled after bid opening only when a compelling reason for the cancellation exists. See, e.g., 52 Comp. Gen. 285 (1972); 49 id. 671 (1969). In determining whether such a reason exists, one of the factors which must be considered is whether the best interest of the Government would be served by making an award under the initial solicitation. Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 105 (1976), 76-1 CPD 294; Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164.

Here it is determined that an invitation for bids contains specifications which overstate the minimum needs of the procuring agency, or the agency after bid opening decides that the needs of the Government can be satisfied by a less expensive design differing from that on which bids were invited, there exists a compelling reason for cancellation of the invitation. Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203. Here, as the agency reasonably determined that the use of steel bar stock would be more cost effective than use of the required castings, the cancellation of the solicitation was not only proper but was required. A. B. Machine Works, Inc., B-187563, September 7, 1977, 77-2 CPD 177.

While a COC is conclusive as to matters of responsibility, it does not preclude a subsequent cancellation of a solicitation which has been determined, in good faith, to overstate the actual needs of an agency. The record does not support Ikard's contention of bad faith by MIRCOM with regard to this cancellation. As a result of Sonora's protest, the agency decided to review whether the specifications could be relaxed. This began at least two months prior to the issuance of the COC for Ikard and the results were not approved until two weeks thereafter. The protester states that under a prior Sonora contract, similar deviations had been approved and there was no need to delay the cancellation in this case until after a COC was issued. It does not appear, however, that the procuring activity fully appreciated the cost ramifications such changes could have in a competitive procurement for the relatively small quantities involved in this case until the specification review by MIRCOM engineers was completed.

Ikard requests that this Office give proper consideration to the fact that several documents attached to the agency report on this protest were undated and prepared after submission of the protest. Our Bid Protest Procedures, 4 C.F.R. § 20.3(c) (1978) require that an agency submit documentation in response to our request for a report and, of necessity, this may be prepared after the submission of a protest. We see no significance in the fact that several of the documents which were attached to the administrative report of August 4, 1978, were undated. There is no indication in the record that the contracting officer's undated written determination to cancel the solicitation does not accurately reflect the facts. Thus, even if it is assumed that the document was prepared after the protest was filed, it would be a deficiency of procedure and form, not of substance, and would not affect the validity of the cancellation.

Ikard also challenges the validity of the cancellation because the contracting officer who prepared the undated determination that the solicitation should be canceled was not the same contracting officer who issued the cancellation amendment. Ikard contends this indicates that the solicitation was not canceled as a result of the independent decision of the contracting officer who signed the amendment as required by the procurement laws and regulations. However, Ikard offers no evidence that the cancellation was not effected by a properly authorized contracting officer and we know of no requirement that a contracting officer signing an amendment canceling a solicitation must be the same one who signed the determination to cancel.

As we have concluded that the solicitation was properly canceled and have found no evidence in the record of bad faith on the part of the procuring agency, it follows that there was no arbitrary or capricious action toward the protester. Thus, there is no basis on which the protester's request for recovery of its bid preparation costs could be granted. Kent Uniform Company, Inc., B-188931, July 25, 1977, 77-2 CPD 46; Keco Industries, Inc., 54 Comp. Gen. 215 (1974), 74-2 CPD 175.

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Accordingly, we must deny the protest and the claim
for bid preparation costs.

R. F. K. H.
Acting Comptroller General
of the United States